

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Joint Petition for Suspension
or Waiver of the Location-Capable
Handset Penetration Deadline

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) WT Docket No. 05-288
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To: The Commission

COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC"), by its undersigned counsel, hereby submits its comments in support of the Joint Petition of CTIA – The Wireless Association and the Rural Cellular Association (the "Joint Petition") seeking relief from Section 20.18(g)(1)(v) of the Commission's rules, 47 C.F.R. § 20.18(g)(1)(v), imposing a December 31, 2005 deadline for wireless carriers to ensure 95 percent penetration of location-capable handsets in their service areas.¹ Specifically, USCC supports the Joint Petition's request for a limited, narrowly-tailored waiver of the December 31, 2005 deadline for those carriers that have satisfied the Commission's 100 percent digital handset activation requirement, or, in the alternative, the issuance of a Public Notice providing guidance to carriers planning to file individual waiver requests based on the criteria delineated in the Joint Petition.² As demonstrated more fully below, a limited, narrowly-tailored waiver is decidedly in the public interest because it

¹ See Public Notice, *Wireless Telecommunications Bureau Requests Comment on Joint Petition of CTIA and RCA Regarding the December 31, 2005 Deadline for Licensee Employing a Handset-Based E911 Phase II Location Technology to Achieve Ninety-Five Percent Penetration of Location-Capable Handsets Among Their Subscribers*, WT Docket No. 05-288, DA 05-2678 (released October 7, 2005).

² See 47 C.F.R. § 20.18(g)(1)(iv).

recognizes that circumstance beyond the control of wireless carriers – namely residual customer unwillingness to swap-out their current handsets and the lack of PSAP Phase II readiness -- have made it impossible to achieve full compliance with the Commission's 95 percent benchmark.

I. THE JOINT PETITION PROPOSES A SPECIFIC, FOCUSED AND LIMITED WAIVER THAT SHOULD BE GRANTED UNDER THE COMMISSION'S WAIVER STANDARD.

The Commission has the authority to waive its rules for good cause shown.³

Grant of a waiver is appropriate where the underlying purpose of the rule would not be served or would be frustrated by its application, and grant of a waiver is in the public interest.⁴ In addition, where it would be inequitable, unduly burdensome or contrary to the public interest to enforce a particular rule in light of the unique or unusual factual circumstances, or where the applicant has no reasonable alternative, a waiver is appropriate.⁵ In the E911 context specifically, the Commission has waived or stayed certain of its deadlines or requirements when circumstances beyond the control of carriers prevented compliance.⁶

The Joint Petition proposes a waiver that is specific, focused and limited in scope. It seeks relief from the December 31, 2005 deadline to achieve 95 percent penetration of phase II compliant handsets only for those carriers who are in compliance with the Commission's requirement that 100 percent of new handset activations are phase II compliant.⁷

³ See 47 C.F.R. § 1.3.

⁴ See 47 C.F.R. § 1.925(b)(3).

⁵ *Id.*

⁶ See, e.g., *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd. 17442 (2000) (extending the timetables for handset deployment and granting a limited waiver to VoiceStream); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, Order to Stay, 17 FCC Rcd. 14841 (2002) (granting a stay of the Phase II implementation deadlines for so-called Tier II and Tier III carriers).

⁷ Joint Petition at 1.

Furthermore, relief is sought based on the unique factual circumstances identified in the Joint Petition that are beyond the control of the wireless carriers. In these circumstances, it would be inequitable for the Commission to initiate enforcement action against carriers who have made good faith efforts and significant progress in reaching the 95 percent penetration level but will be unable to attain full compliance by December 31, 2005.

A. Wireless carriers do not control customer behavior.

As demonstrated in the Joint Petition, wireless carriers' inability to reach the 95 percent penetration benchmark is due in part to reluctance on the part of some wireless customers to upgrade their handsets.⁸ First, customer churn among wireless carriers is lower than anticipated by the Commission when it adopted the December 31, 2005 deadline.⁹ Carriers such as USCC have improved their service offerings and have experienced an increase in customer satisfaction. As a result, customers are remaining with their current wireless provider in greater number, and consequently are less likely to require a new handset.

Second, some customers are not interested in purchasing new equipment, only to be required to learn new handset features, reenter contact and other information stored on their current handset and/or purchase new accessories for the handset. Many of these customers are satisfied with the current features of their handsets and see no reason to upgrade at this time.

Third, some wireless customers, especially rural wireless customers, are affirmatively unwilling to part with their current handsets. In rural areas, three-watt analog handsets provide significantly better coverage/range in remote areas than any phase II compliant digital handset. Moreover, in most of these rural areas, local PSAPs have not upgraded their

⁸ Joint Petition at 4-7.

⁹ See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd. 17388, 17411-12 (1999) (adopting the initial penetration benchmarks based on estimated annual churn rates of 24 or 25 percent).

equipment to provide phase II service so that rural consumers obtain no additional benefit for upgrading their handsets. The Commission is at least partially responsible for this problem because it has required wireless carriers to continue to provide analog service until February 2008, virtually ensuring that analog customers will exist until that date.¹⁰ In doing so, the Commission acknowledged the very problem faced by wireless attempting to reach the 95 percent penetration requirement: “[t]he immediate elimination of the analog requirement . . . could have a significant impact on some consumers” in part because there are “some geographic areas in which digital coverage is currently insufficient.”¹¹

Rigid insistence on the December 31, 2005 deadline in these circumstances could force wireless carriers into a Hobson’s choice – either require these customers to swap-out their handsets or discontinue their wireless service. Moreover, the problem does not end even if every customer gives up his/her handset. The coerced trade-in of analog handsets at this time will likely cause coverage losses due to the differences in range between three-watt analog handsets and any phase II compliant, digital handset currently available. Thus, service can be terminated entirely or just reduced from current levels. Neither result serves the public interest.¹²

The Commission’s recent actions imposing E911 requirements on VoIP providers are instructive here. Like wireless carriers, VoIP providers were unable to comply with some of the FCC’s E911 requirements because they could not control consumer actions/behavior. The Commission initially required that VoIP providers notify and obtain affirmative consent from

¹⁰ See *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, 17 FCC Rcd. 18401 (2002).

¹¹ *Id.* ¶¶ 22, 24.

¹² See also Alltel Corporation Petition for Limited Waiver, CC Docket No. 94-102 (filed September 30, 2005) (“*Alltel Waiver Request*”) at 8.

100 percent of their subscribers regarding the E911 capabilities/limitations of the service.¹³ The Commission also required VoIP providers to terminate service to subscribers from whom they were unable to obtain such affirmative consent.¹⁴ However, following numerous complaints from consumers and members of Congress, the Enforcement Bureau subsequently announced it would suspend any enforcement actions against VoIP providers that had obtained acknowledgement from at least 90 percent of their subscriber base.¹⁵ In doing so, the Bureau recognized that despite the “substantial efforts” of VoIP providers, they could not control the actions of their subscribers and therefore should not be subject to enforcement actions provided a showing of substantial progress could be made. This announcement also implicitly recognized that the public interest is not served by forcing carriers to cut-off service to consumers in the name of enhancing public safety.

These two conclusions are equally applicable to the wireless E911 handset penetration deadline. It would be fundamentally unfair to take enforcement action against wireless carriers that have made substantial progress toward the 95 percent penetration requirement but have been unable to attain full compliance due to the reluctance of a relatively small percentage of their customers to upgrade their handsets. In addition, wireless carriers should not be placed in the position of having to force their customers to give up their current handsets or cut-off service by December 31, 2005. The cut-off of wireless customers for failing

¹³ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd. 10245, ¶¶ 48, 73 (2005).

¹⁴ See Public Notice, *Enforcement Bureau Provides Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning the July 29, 2005 Subscriber Notification Deadlines*, WT Docket No. 04-36, DA 05-2085 (released July 26, 2005).

¹⁵ See Public Notice, *Enforcement Bureau Provides Further Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgement Requirement*, WC Docket No. 04-36, DA 05-2530 (released Sept. 27, 2005).

to upgrade their handsets in the name of public safety elevates form over substance and undermines the basic objectives of the entire wireless E911 proceeding.

B. Some wireless customers will not upgrade handsets if PSAPs cannot provide Phase II location service.

As demonstrated in the Joint Petition, one of the principal reasons wireless customers were reluctant to upgrade their handsets is the lack of PSAP readiness to receive and utilize phase II location information.¹⁶ Predominantly due to funding issues that are beyond their control, the majority of PSAPs across the country have not upgraded their systems to utilize phase II information received from wireless carriers and will not do so by December 31, 2005. In USCC's service area, for example, only 40 percent of the PSAPs are capable of receiving and utilizing phase II location data.¹⁷

Where the PSAP's facilities have not been upgraded, there is very little incentive for an otherwise reluctant customer to replace his or her handset with one that contains location-capable technology regardless of any pricing or enhanced service plan offered by the carrier. Moreover, if local PSAPs have not been upgraded, wireless carriers cannot advertise the availability of location technology assistance to encourage/entice these otherwise reluctant customers to upgrade their handsets. Indeed, the Commission's own rules recognize that the more specific, phase II location information is *only* meaningful for consumers when the PSAPs have upgraded their facilities to use that information.¹⁸ The rules implicitly recognize that when

¹⁶ Joint Petition at 4.

¹⁷ See also *Alltel Waiver Request* at 18 (asserting that fewer than 25 percent of PSAPs in Alltel's service area will be ready to receive and utilize phase II location information by December 31, 2005); *Sprint Nextel Corporation Request for Limited Waiver*, CC Docket No. 94-102 (filed September 29, 2005) at 29-32 (estimating that by December 31, 2005, less than 44 percent of its subscribers would reside in an area with a PSAP that is capable of receiving and utilizing phase II information).

¹⁸ See 47 C.F.R. § 20.18(j)(3) (tolling the carrier's implementation obligations when the PSAP is unable to demonstrate that it will be ready to receive and utilize the data elements associated with the service).

phase II location information cannot be used by the PSAP, it has no value to wireless consumers and does not improve overall public safety. For these same reasons, carriers should not be subject to enforcement actions for failing to satisfy the 95 percent handset penetration deadline when the location information provided by the handsets would not otherwise improve public safety because local PSAPs have not deployed phase II.

C. Requiring strict compliance will undermine other FCC public interest goals.

Finally, requiring strict compliance with the 95 percent penetration deadline will force wireless carriers to divert funds from other capital intensive efforts recognized by the FCC to serve the public interest. These efforts include: (i) building-out and improving service in wireless markets, including rural markets where three-watt analog phone are still king; (ii) improving call-processing functions within a carrier's network; and (iii) roll-out of broadband or other advanced wireless services. When carriers are close to the 95 percent benchmark and can show good faith progress toward reaching that goal, the Commission should not force these carriers to redirect more and more of their finite capital budgets away from other public interest investments in the name of reaching a 95 percent handset penetration level that will be useless to customers served by over 50 percent of the PSAPs across the country.

II. ALTERNATIVELY, THE COMMISSION SHOULD PROVIDE CARRIERS WITH A FRAMEWORK FOR REQUESTING A WAIVER OF THE DECEMBER 31, 2005 DEADLINE.

If the Commission declines to grant the limited waiver proposed in the Joint Petition, the Commission should provide guidance to wireless carriers on the contents of individual requests for waiver of the 95 percent handset penetration deadline.¹⁹ As indicated in

¹⁹ In the E911 proceeding, the Commission has previously provided such guidance to carriers in advance of filings. See Public Notice, *Wireless Telecommunications Bureau Provides Guidance on Carrier Reports on Implementation of Wireless E911 Phase II Automatic Location Identification*, 15 FCC Rcd. 23595 (2000).

the Joint Petition, if a carrier can make a threshold showing that it has made good faith efforts to achieve 95 percent penetration of location-capable handsets in its service area, and can satisfy one of several factors that would justify additional time to achieve that goal, that carrier should be afforded a temporary, limited waiver of the December 31, 2005 deadline.²⁰ Such a framework would provide helpful additional guidance to carriers for presentation of evidence justifying a waiver and would recognize the marketplace realities described above that have prevented wireless carriers from achieving full compliance. In addition, it would permit the Commission to streamline the waiver request and review process by creating uniformity in the presentation of information deemed important/relevant in evaluating individual waiver requests.

III. CONCLUSION

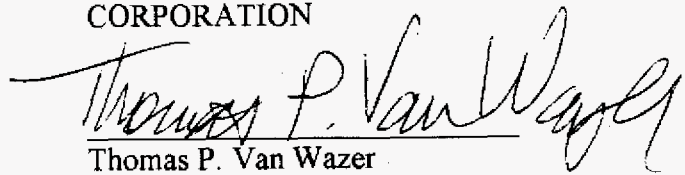
For all these reasons, USCC respectfully requests that the Commission grant the limited, narrowly-tailored waiver request of the 95 percent phase II compliant, handset penetration requirement requested by the Joint Petition. Strict insistence on compliance with the December 31, 2005 deadline will elevate form over substance because it will force customers to turn in handsets they want to keep, require carriers to divert even more capital from other FCC approved public interest projects and only marginally increase overall public safety because the majority of PSAPs have yet to deploy phase II. Alternatively, USCC requests that the Commission adopt the waiver framework proposed in the Joint Petition in order to streamline the

²⁰ Joint Petition at 10-15.

process by which wireless carriers file individual waiver requests of the 95 percent penetration deadline and the Commission evaluates those requests.

Respectfully submitted,

UNITED STATES CELLULAR
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A handwritten signature in dark ink, appearing to read "Thomas P. Van Wazer", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2005, I caused true and correct copies of the foregoing Comments of United States Cellular Corporation to be served by mail upon:

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